

D.P.U. 92-DS-64

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by S.P. Adams Construction Company, Incorporated.

APPEARANCES: Denise Adams, President
S.P. Adams Construction Company, Incorporated
124 Stetson Road
Norwell, Massachusetts 02061
FOR: S.P. ADAMS CONSTRUCTION CO., INC.
Respondent

Gail Soares, Dig-Safe Investigator
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On December 9, 1992, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to S.P. Adams Construction Company, Incorporated ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on December 3, 1992, at Sharon Road, Easton, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precaution, causing damage to an underground service line operated by Bay State Gas Company ("Bay State Gas" or "Company"). The NOPV also stated that the Respondent had the right to either appear before a Department hearing officer at an informal conference on January 14, 1993 or send a written reply to the Department by that date.

On January 4, 1993, pursuant to 220 C.M.R. § 99.06 (1), the Respondent submitted a written response disputing the allegations in the NOPV. In a letter dated February 4, 1993, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. On February 11, 1994, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on May 10, 1994 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq.

At the hearing, Gail Soares, a Dig-Safe investigator, appeared on behalf of the Division. Brant Bollivar, supervisor of maps and records for the Company and Gregory Browne of the gas distribution department for the Company testified on behalf of the Division. The Division presented eight exhibits. Denise Adams, president of S.P. Adams Construction Company testified

on behalf of the Respondent. The Respondent presented four exhibits. All exhibits were moved into evidence.

II. SUMMARY OF FACTS

A. The Division

The Division alleged that the Respondent failed to tender proper notification and failed to exercise reasonable precaution while installing a septic system at 18 Sharon Drive in Easton, Massachusetts, which resulted in damage to a 1 1/4-inch coated steel gas line operated by the Company (Tr. at 4; Exh. D-1). In support of this allegation Ms. Soares testified and presented evidence that the Respondent telephoned Dig-Safe System Inc.¹ and was assigned a Dig-Safe ticket² for 6 Sharon Drive (Tr. at 9; Exh. D-5). Mr. Bolivar stated that the damage occurred at 18 Sharon Drive and estimated the distance to be approximately 350 feet from 6 Sharon Drive (Tr. at 8).

The Division also alleged that the Respondent failed to exercise reasonable precaution while excavating at 18 Sharon Drive (id. at 4; Exh. D-3). The Division presented an underground damage report which indicated that the damage was caused by a backhoe (Exh. D-1).

B. The Respondent

Ms. Adams stated that she telephoned Dig-Safe on October 13, 1993 to request markings

¹ Dig Safe System, Inc. was formed by underground utility companies pursuant to G.L. c. 164 § 76D, to serve as a clearinghouse for information on excavations throughout Massachusetts.

² A "ticket" is a document produced by the Dig Safe System, Inc. that describes the proposed excavation in a summarized format. The ticket is transmitted to all underground utility companies and serves as notice to them of the excavation.

for the entire Oakwood Condominiums in Easton (Tr. at 17; Exh. D-5). The Respondent testified that there was confusion concerning the address of the proposed excavation (Tr. at 17). She testified that Dig-Safe operator insisted on a street address (id.). Ms. Adams testified that although there were street numbers present she did not know the numbers of the buildings (id. at 18). Ms. Adams stated that she may have told the Dig-Safe operator that there are more than six buildings involved and she thinks this may explain the 6 Sharon Drive address on the Dig-Safe ticket (id.).

Ms. Adams stated that after 6 Sharon Drive was marked out, she called the maps and records division of the Company to request further markouts for the remaining buildings (id. at 18-19). Ms. Adams stated that she was assured by the Company that the remaining buildings would be marked out before excavation began (id. at 19-20). Finally, Ms. Adams stated that Bay State did not markout the remaining unmarked buildings and excavation began on October 19, 1992 (id. at 20).

The Respondent stated that damage was caused by a backhoe (id. at 26). The Respondent also stated that damage to the pipe occurred because there was no caution tape or sand to indicate that there was an underground utility present (id.).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

No person shall...unless at least seventy-two hours, exclusive of Saturdays, Sundays and legal holidays, but no more than thirty days, before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies, public utility companies, cable television companies and municipal utility departments as supply gas, electricity, telephone or cable television service in or to the city or town where such excavation is to be made. Such notice shall set forth the name of the street or the route number of said way and a reasonable accurate description of the location in said way or on private property the excavation is to be made...

The statute requires that any person who contracts for or conducts an excavation must provide advance notice and a reasonably accurate description³ of the excavation site to the operators of underground utilities. R.J. Cincotta Company, Inc., D.P.U. 89-DS-76 (1990); Todesca Equipment Company, Inc., D.P.U. 89-DS-14 (1990). The Department, for example, has found that an area over 100 feet from the area requested by an excavator to be marked was not "reasonably accurate" as the Dig-Safe Law mandates. R.J. Cincotta Company, Inc., D.P.U. 89-DS-76 (1990).

³ Guidelines for what constitutes "reasonably accurate" have been set forth in 220 C.M.R. 99.04. A reasonable description includes, inter alia, the city or town, name of the street, and number of the closest building to where the excavation will take place. 220 C.M.R. 99.04 (1) (a) (b) (c).

The regulation states:

- (1) To the extent reasonably practicable, notice of a non-emergency excavation shall include:
 - (a) the city or town where the excavation will take place;
 - (b) the name of the street, way, or route number of the excavation site;
 - (c) the name of the streets at the nearest intersection to the excavation;
 - (d) the number of the building closest to the excavation;
 - (e) any/or other descriptions of the excavation site including landmarks and utility pole numbers; and
 - (f) the date and location of any blasting.

G.L. c. 82, § 40 also states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. Several recent cases have established the proposition that using a machine to expose facilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990). However in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp., D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from its duty to use reasonable precautions. Fed Corp, supra; Amorello, D.P.U. 89-DS-61 (1990). However, the depth of an underground facility may be relevant in certain cases when that depth may have limited the precautions an excavator could have taken to protect underground facilities. Amorello & Sons, D.P.U. 87-DS-148, at 7-8 (1993); New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must

accompany that allegation. New England Excavating, *supra*, at 9; Fed. Corp., *supra*, at 5-6. In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp., *supra*; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

IV. ANALYSIS AND FINDINGS

The issues to be determined in this case are whether the Respondent failed to provide a reasonably accurate description of the intended excavation site and failed to exercise reasonable precaution during excavation.

In addressing the first issue, the Respondent is required to provide a reasonably accurate description of the excavation site. The Respondent testified that she called Dig-Safe and requested that Oakwood Condominiums on Sharon Drive be marked out. However, she was unable to give the Dig-Safe operator a street address. The Respondent did not attempt to ascertain the street address and recontact Dig-Safe Inc. at that time.

The Division presented a copy of a Dig-Safe ticket which indicated the Respondent's request for marking of 6 Sharon Drive. In light of this evidence and the Respondent's testimony that she site requested that Oakwood Condominiums be marked out, there appears to have been confusion as to what was to be marked by the Company. Pursuant to the Dig-Safe Law, the Respondent has the responsibility to provide a reasonably accurate description when giving initial notice to utilities requesting markings. The Respondent failed to provide a

reasonably accurate description with respect to this first notice.

The Respondent testified that when markings were not present for the entire complex, she telephoned the maps and records division of the Company to request markings for the rest of the complex. The Department finds that this second call which was made to the Company and not Dig-Safe was actually the initial notice for the rest of the complex. Pursuant to the Dig-Safe Law, initial notice must be in writing to a company 72 hours in advance. Therefore, this notice was deficient. The proper course of action would have been for the Respondent to ascertain the correct street addresses of the buildings that were not marked and then recall Dig-Safe Inc. or notify the Company in writing at least 72 hours prior to excavation as required by the Dig-Safe Law. Accordingly, the Department finds that the Respondent was in violation of the Dig-Safe Law for failing to render proper notification prior to excavation.

With regard to whether the Respondent failed to use reasonable precaution, the Respondent testified that it was a backhoe that caused the damage to the underground utility. The Respondent did not indicate why hand-digging could not be used or was impossible. The Department has found that using a machine to locate utilities, rather than hand-digging, constitutes a failure to exercise reasonable precaution. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990). Accordingly, the Department finds that the Respondent failed to exercise reasonable precaution while excavating at 18 Sharon Drive.

V. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That S.P. Adams Construction Company, Incorporated, violated the Dig-Safe Law when it failed to render proper notification while excavating on December 3, 1992 at 18 Sharon Drive, in Easton; and it is

ORDERED: That S.P. Adams Construction Company, Incorporated, being a violator of the Dig-Safe Law, shall pay a civil penalty of \$200 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,

Kenneth Gordon, Chairman

Barbara Kates-Garnick, Commissioner

Mary Clark Webster, Commissioner